UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

GRAYBAR ELECTRIC COMPANY, INC.

Employer-Petitioner

And Case 19-UC-710

TEAMSTERS LOCAL UNION NO. 117, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.

Union

REGIONAL DIRECTOR'S DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[1] in this proceeding, the undersigned makes the following findings and conclusions.[2]

SUMMARY

On May 20, 2003, the Employer-Petitioner filed the instant petition seeking clarification of an existing bargaining unit of warehouse workers located at the Employer's Seattle branch facility and represented by the Union. In particular, the Employer seeks to exclude three former Seattle branch employees who, pursuant to an arbitration award, were reinstated by the Employer at its new nonunion Puyallup facility, which is located 30 to 40 miles from the Seattle branch. Additionally, the arbitration award ordered that employees reinstated at Puyallup remain members of the Union's Seattle branch bargaining unit. In essence, the Employer contends that I am not bound by the arbitration award in deciding this petition for unit clarification. To the contrary, the Union opposes the petition and requests that I uphold the arbitrator's award.

---

[1] Both parties filed timely briefs, which were duly considered.

[2] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

Based on the record evidence and the arguments presented by the parties I shall clarify the unit to exclude the former Seattle branch employees who were reinstated at Puyallup from the unit represented by the Union.

Below, I have set forth a section dealing with the facts, as revealed by the record in this matter and relating to background information about the Employer's operations, the arbitrator's award and recent negotiations that led to a successor labor agreement and that also led to the filing of the present petition. Following the facts section is my analysis of the applicable legal standards in this case, my Order granting the petition to clarify the unit, and a section setting forth the right to request review of my Decision and Order.

A.) FACTS

1.) Background Information about the Employer's Operations

The Employer is a State of Washington corporation engaged in the wholesale distribution of communications data and electrical products to end users, such as large technology companies like Lucent and Qwest, and to industrial companies and some utilities. The Employer is headquartered in St. Louis, Missouri and has numerous facilities located throughout the United States. The Employer divides its operations into 13 geographical districts with a total of 260 branches within those districts. One of the districts is the Seattle district, which includes Alaska, Washington, Oregon, Idaho, Montana, Utah and Hawaii.

Within the Seattle district, the Employer operates a Seattle branch facility, which includes warehouse functions, stock handling for delivery to customers, wire cutting, and other related functions including the operation of forklifts by Seattle branch employees. The Union has represented a unit of employees at the Seattle branch since 1976.[3] The Employer had, until the recent past, also operated branch facilities located in Bellevue, Tacoma and Everett, cities within about a half hour to a 45-minute drive from the heart of Seattle.[4] Employees at those three branches, as in the Seattle branch, had routinely handled stock for

[3] On April 1, 1997, the Board certified the results of an election in Case 19-RD-3313 covering the Employer's Seattle branch employees. In the certification of the election results, the Board described the Union's bargaining 'unit" at the facility as follows: All warehouse workers, receiving clerks, shipping clerks and material handlers employed by the Employer in its Seattle, Washington, operations; excluding all sales force employees, guards and supervisors as defined in the Act. The Employer and Union were party to a labor agreement, which by its terms was effective from March 21, 2000, "until" January 31, 2003. In that agreement, the Union is recognized as the representative "for all employees of the Employer in the classifications of work covered by this Agreement." That agreement further lists those classifications as follows: warehouse (includes van driver), receiving clerk, shipping clerk and wire cutter. The parties use the term "materials handler" to generally refer to employees at the Puyallup facility and at the Seattle branch who perform work of the nature long performed by the Seattle branch bargaining unit.

[4] The City of Bellevue is located just across Lake Washington from the City of Seattle.

delivery to customers, cut wire and operated forklifts. However, the Union had not represented any of the employees at these three other branches.

In the mid to late 1990s, the Employer experienced double-digit growth in its nationwide business, which resulted in the Employer's total national workforce of about 4,500 employees expanding to about 10,000. Due to the growth in the Employer's business, the Seattle branch was operating well in excess of its capacity. During this time, GE Supply, a competitor of the Employer, implemented a more efficient warehouse operation and gained a competitive edge over the Employer. In response, the Employer implemented a "zone" approach to its operational structure whereby 16 new and updated warehouses were located outside major metropolitan cities throughout the country. It appears from the record that this "zone" approach exists within the Employer's district/branch structure.

One of these new, updated zone warehouses included the Puyallup facility or "Puyallup zone" which is located about 30-40 miles from the Seattle branch and which opened in April of 2001. It is the only zone in the Employer's Seattle district. The 16 new zone warehouses, including the Puyallup facility, established streamlined operations to help increase the speed of delivery service to customers. As a result, the zone operations became paperless as inventory was scanned on computers only, whereas the records at the old warehouse facilities, including the Seattle branch, were kept manually. The work at the new zone warehouses is limited to receiving, stowing, packing and shipping stock. Unlike the branch facilities, there is no direct customer contact and no "will-call" or "assemble-and-holds" services offered to walk-in customers at the zone facilities.

The Puyallup zone reports to the St. Louis headquarters and to the Seattle district operations, but not to the Seattle branch. The Puyallup zone and the Seattle branch have separate supervision and lower level management. The managers and supervisors of the Seattle branch and the Puyallup zone have no authority over each other's operation, particularly as it relates to discipline and hiring. Thirty-six nonunion "material handlers" were hired at the Puyallup zone when it opened. With the exception of the reinstated former Seattle branch employees, there have been no employee transfers between the two facilities.

At the time the Puyallup zone was opened, the Seattle branch employed about 30 employees. Following the opening, some of the surplus material that had been stocked at the Seattle branch was moved to Puyallup. Additionally, some suppliers ceased making shipments of material to the Seattle branch and, instead, sent their shipments directly to Puyallup. In or about 2000 and 2001, the Seattle branch's inventory decreased by about 50 percent and overtime for

bargaining unit employees also decreased. By August 2002, the bargaining unit was reduced by layoff and other means to 13 employees.[5]

2.) The Arbitrator's Award

In response to the reduction in work at the Seattle branch, the Union filed a grievance, which eventually lead to arbitration. In arbitration, the Union contended that the parties' 2000 - 2003 labor agreement prohibited assigning bargaining unit work away from the Seattle branch to the Puyallup zone. On October 4, 2002, the Arbitrator found that the Employer was unjustified in assigning bargaining unit work to non-unit workers in Puyallup after April of 2001, while at the same time laying off bargaining unit employees at the Seattle branch. Because the Arbitrator determined there was no showing that the Employer acted arbitrarily, capriciously or in bad-faith and there was no evidence of anti-Union animus, she granted a prospective remedy only by ordering the Employer to promptly offer reinstatement, with full seniority, to all employees laid-off since April 2001 from the Seattle branch and into positions, for which they were qualified, at the Puyallup facility.[6]

After the Arbitrator issued her award, the Employer requested her to reconsider the remedial aspects of the award and return the assigned work, along with the reinstated employees, to the Seattle branch. The Union opposed the Employer's request, claiming the Arbitrator lacked authority to modify the award and filed a complaint to enforce the award in U.S. District Court for the Western District of Washington on November 21, 2002. The Employer filed a counterclaim but, pursuant to a stipulation with the Union, it withdrew its counterclaim on April 25, 2003. The Union's District Court case is still pending.

In a supplemental award, issued on November 26, 2002, the Arbitrator further ordered that all employees who accepted the offers of reinstatement shall, inter alia, remain members of the Seattle branch bargaining unit, but their labor agreement rights would be limited to the recognition, union security and other provisions related to and governing their wages and monetary benefits. She also ordered the reinstated employees to be integrated into the Puyallup operations and that all Seattle branch labor agreement provisions (e.g., shift assignments, work assignments, vacation scheduling, leaves, overtime assignments, and other rules) were suspended with respect to the reinstated employees until and unless the Union and the Employer agree otherwise.

Following arbitration, the Employer offered reinstatement to the former Seattle branch employees who had been laid off. Out of the eight former branch

---

[5] The record indicates that the reduction in the unit was due, in large part, to the layoff of eight employees.

[6] It is undisputed that the Union does not seek to represent any other employees at the Puyallup zone other than the former Seattle branch employees who were reinstated at Puyallup pursuant to the Arbitrator's award.

employees offered reinstatement, five accepted the offer. Shortly thereafter, one quit and, later still, another quit. Thus, three former Seattle branch employees remain employed in the Puyallup zone and currently work alongside 17 other materials handlers hired by the Puyallup zone.

The record reveals that the Employer provided training to the reinstated employees regarding their work at the Puyallup zone. The extent and nature of this training is not clear but it is apparent that the stocking aisles are narrower in Puyallup, the forklifts are smaller and the scanning equipment, used by employees in Puyallup, is not utilized in the Seattle branch.

3.) Recent Negotiations

On March 29, 2003, the Seattle branch unit ratified a new labor agreement, which by its terms is effective on February 1, 2003, until January 31, 2006. The parties later executed the agreement in April. In the new agreement, the parties modified the "recognition and bargaining unit article," which states in part that the bargaining unit consists of all warehouse workers, receiving clerks, shipping clerks, wire cutters, materials handlers and van drivers employed by the Employer "at its Seattle, Washington operations" but excluding truck drivers, office and administrative personnel, guards and supervisors as defined in the Act. The parties dispute the interpretation and/or application of the new language of the recognition and bargaining unit article.

Before reaching agreement on that article, the Employer took the position, during negotiations, that the reinstated former branch employees were not included in the unit. Indeed, it took the position that the subject was not a mandatory subject of bargaining and any insistence on including them was an unfair labor practice. The Union took the position that the reinstated employees were members of the unit and any insistence on excluding them was an unfair labor practice. A proposed recognition and bargaining unit article was initially rejected by the Union when the Employer inserted the street address of the Seattle branch. The street address was later removed and, in its place, "Seattle operations" was inserted. However, there was still disagreement concerning the bargaining unit status of the reinstated employees, on February 21, 2003.

Neither party stated its position at the negotiation table after February 25, when the parties tentatively agreed to the current language in the recognition and bargaining unit article and before the new agreement was executed in April.[7] Notwithstanding the foregoing, the parties stipulate that there were discussions about using the Board's unit clarification procedure to resolve the issue of the reinstated employees.

[7] Another Employer witness asserts he believes the Employer, at the negotiating table, stated after February 25, 2002, that the provision excluded the reinstated employees. However, he could not remember when this was said or who said it.

After concluding negotiations for a new agreement, the Employer removed the reinstated employees from the bargaining unit and placed them under the Puyallup wage and benefit package. In response to the removal, the Union filed a new grievance on April 11, 2003, contending that the Employer unilaterally removed the reinstated employees from the bargaining unit. The Union subsequently allowed the contractual time periods for further processing of this new grievance to lapse.

B.) POSITION OF THE PARTIES

The Employer contends the reinstated employees should be excluded from the Seattle unit because (1) the arbitrator's award is inconsistent with the Board's policies for appropriate units; (2) the Union relinquished its demand for the reinstated employees when it signed the new labor agreement; and (3) the Union waived its right to contest the bargaining unit issue under the terms of the new agreement by allowing its most recent grievance on the issue to lapse.

The Union contends that the Seattle branch bargaining unit should be clarified to include the reinstated employees working in Puyallup. The Union bases its contention on the Arbitrator's award that specifically included the disputed employees in the Seattle branch unit. The Union further contends that it successfully opposed the Employer's attempts, in negotiations for a new labor agreement, to change the scope of the unit to exclude the reinstated employees. The Union did not take a position regarding the Employer's contention that the Union waived its right to dispute the Employer's position on the unit issue when the Union allowed its most recent grievance, under the new agreement, to lapse.

C.) ANALYSIS

In order for clarification of a unit to be appropriate, a petitioner must show either that: (1) there have been recent substantial changes in the employer's operations;[8] or (2) the jobs in issue are new or substantially changed since the parties entered into their collective-bargaining agreement.[9] Here, the Employer did not file the instant petition until after it had reinstated and integrated the former Seattle branch employees into the Puyallup operations and, then, not until after the Employer had commenced and culminated negotiations for a successor labor agreement. Thus, an initial issue arises as to whether the unit clarification petition is appropriate under the circumstances in this case.

In October of 2002, the Arbitrator required, as a remedy for the Employer's contract violation, that the Employer reinstate eight former Seattle branch

[8] *Batesville Casket Co., Inc.*, 283 NLRB 795 (1987).

[9] *Sunar Hauserman*, 273 NLRB 1176 (1984); *The Washington Post*, 256 NLRB 1243 (1981).

employees to the Employer's unrepresented Puyallup zone. In apparent disagreement with the award, the Employer sought reconsideration by the Arbitrator of her award while the Union filed a complaint in U.S. District Court requesting enforcement of the original award and seeking to deny jurisdiction to the Arbitrator for any supplemental decision.

While the parties were involved in proceedings connected to and following the Arbitrator's initial award, they engaged in negotiations for a new labor agreement. During negotiations, both parties took the position that the subject of inclusion or exclusion of the disputed employees into the unit was not a mandatory subject of bargaining and discussed the possibility of resolving the issue through the Board's unit clarification procedure. Although both parties believed their respective positions on the matter taken during negotiations were victorious, the new agreement, executed by the parties in April 2003, did not include a provision that expressly resolved the dispute. It was these failed attempts to resolve the unit issue which preceded the Employer's filing of the instant petition in May 2003.

In *Steel Workers Local 7912 (U.S. Tsubaki)*, 338 NLRB No. 5 (2002), the Board was faced with circumstances similar to those present here. In the *Steel Workers* case, U.S. Tsubaki filed a petition to clarify a historical unit of employees following the relocation of some unit employees to another facility. The Steel Workers Union represented the historical unit and opposed the petition. A Regional Director of the Board denied the petition after a hearing on the matter. Consequently, U.S. Tsubaki filed a request for review of the Regional Director's decision with the Board. While that request for review was pending, U.S. Tsubaki unsuccessfully attempted to resolve the bargaining unit dispute through negotiations and eventually executed a new labor agreement leaving intact the historical unit. Subsequently and during the term of the new labor agreement, the Board reversed the Regional Director and found that the relocated employees were no longer part of the historical unit. Following the Board's reversal of the Regional Director, U.S. Tsubaki attempted to bargain with the Steel Workers in the unit clarified by the Board. However, the Steel Workers refused to bargain, citing the parties' new labor agreement that left intact the historical unit.

In response to the Steel Workers refusal to bargain, U.S. Tsubaki filed an unfair labor practice charge with the Board. In the unfair labor practice proceeding, the Board found that the parties' new labor agreement "was not the product of any voluntary mutual agreement to vary the scope of the extant bargaining unit" and, under the circumstances, it could not fault U.S. Tsubaki for choosing to bargain and conclude negotiations with the Steel Workers while pursuing its lawful request for review of the regional director's decision. Thus, the Board further found that the Steel Workers violated the Act by refusing to

bargain in the unit found appropriate by the Board in the prior unit clarification proceeding.[10]

In the instant case, the Employer chose to honor the Arbitrator's award by continuing to recognize the unit as including the relocated former Seattle branch employees, until after concluding negotiations for a successor labor agreement. While it is permissible for the parties to negotiate a labor agreement covering a unit of the scope sought by either the Union or the Employer, the record reveals that the parties did not negotiate such an agreement.[11] Rather, during negotiations, the Employer and the Union effectively held to their respective positions regarding the reinstated employees and when it became apparent to the Employer that the new labor agreement failed to resolve the dispute, the Employer filed the instant petition.

As for the Employer's contention that the Union waived its right to dispute the Employer's interpretation and/or application of the new labor agreement by allowing its most recent grievance on the issue to lapse, I find that such a lapse does not represent a clear and unmistakable waiver on the Union's part with respect to its claim to represent the reinstated employees. In particular, I note that the Union is proceeding in District Court with its actions to enforce the Arbitrator's original award and that, during negotiations, it did not expressly agree to contract language resolving this dispute. See *Teamsters Local 71*, 331 NLRB 152 (2000).

Based on the foregoing and the record as a whole, I find that neither party to this proceeding has waived its right to seek clarification of the unit in line with their respective positions in this matter.

Next, I must decide whether the unit created by the Arbitrator is an appropriate unit for bargaining. In this regard, the Board has held that the determination of questions of representation, accretion, and appropriate unit does not depend upon contract interpretation but involves the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than an arbitrator. *Tweddle Litho, Inc.*, 337 NLRB No. 102 (2002), citing *Marion Power Shovel*, 230 NLRB 576, 577-578 (1977). However, if by the time the dispute reaches the Board, arbitration has already taken place, the Board shows deference to the arbitration award, providing the arbitration

[10] See also *St. Francis Hospital*, 282 NLRB 950 (1987) where the parties in that case could not agree on whether a disputed classification should be included in the unit but did not wish to press this issue at the expense of reaching an agreement. There, the Board held that it would entertain a petition filed shortly after the contract is executed, absent an indication that the petitioner abandoned its request in exchange for some concession in negotiations.

[11] I also note that when the Board finds a group of relocated employees to be a separate appropriate unit, an existing labor agreement covering those employees in their original bargaining unit does not apply, absent explicit agreement by the employer and union that it should continue to apply. *Steel Workers*, 338 NLRB slip op. at 1.

procedure was a fair one and the results were not repugnant to the Act. *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 272 (1964).

In *Gitano Distribution Center*, 308 NLRB 1172 (1992), the Board held that when an employer transfers some of its represented employees from one location to a new location, there is a rebuttable presumption that the relocated employees constitute a separate appropriate unit at their new facility. In determining whether the presumption has been rebutted, the Board looks at factors such as the following: (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions and working conditions; (3) degree of employee interchange; and (4) distance between locations and bargaining history, if any. *U.S. Tsubaki, Inc.*, 331 NLRB 327 (2000), citing *Esco Corp.*, 298 NLRB 837 (1990); *Gitano Distribution Center*, supra. Thus, the presumption is that the Puyallup zone is a separate appropriate unit unless that presumption is rebutted by the record evidence in this case.

Applying the factors above here reveals that the presumption has not been rebutted. In particular and with regard to the first set of factors, the record discloses that the Puyallup zone and the Seattle branch operations have separate supervision and management and that the two facilities have no role in the other's discipline or hiring. Regarding the second set of factors, the record discloses that the Puyallup zone and Seattle branch operations are largely similar but, because differences do exist, some training was required to insure that the reinstated employees were functionally integrated into the updated Puyallup operations. The record further discloses that, except for union security, wages, benefits, seniority and the grievance procedure (the latter being limited to only the already mentioned provisions), all reinstated Seattle branch employees were placed under the same work rules as those covering the other materials handlers employed at the Puyallup zone. Since the new labor agreement became effective in 2003, the three remaining reinstated employees have been functionally integrated into the Puyallup operations and completely merged with the significantly larger majority of materials handlers employed at the Puyallup zone. With respect to the third factor, there simply has been no interchange or transfers between the Puyallup zone and the Seattle branch operations other than the disputed reinstatement of the former Seattle branch employees at Puyallup. With respect to the fourth set of factors, the Puyallup zone is located 30 to 40 miles from the Seattle branch. In addition, the only history of collective bargaining, in the unit sought by the Union, is based on the Employer's prior compliance with the Arbitrator's award. Based on these factors and the record as a whole, it is apparent that the presumption set forth in *Gitano Distribution Center*, supra, has not been rebutted and that the Puyallup zone is, separately, an appropriate unit.

When the presumption is not rebutted, the Board then applies a simple fact-based majority test to determine whether the employer is obligated to

recognize and bargain with the union as the representative of the unit at the new facility. If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, the Board will presume that those employees continue to support the union and will find that the employer is obligated to recognize and bargain with the union as the exclusive collective-bargaining representative for the employees in the new unit. Absent this majority showing, no such presumption arises and no bargaining obligation exists. *U.S. Tsubaki*, 331 NLRB at 328.

In the case at hand, the reinstated former Seattle Branch employees have been functionally integrated and completely merged with the overwhelming majority of materials handlers employed at the Puyallup zone. Indeed, the reinstated branch employees have never, at any time relevant herein, constituted a majority of the materials handlers employed at the Puyallup zone.[12] Thus, there is no basis for requiring the Employer to recognize the Union as the bargaining representative of a unit of all materials handlers employed at the Puyallup zone or of a unit comprising only the former branch employees now working at the Puyallup zone.

In sum, the Arbitrator's award is contrary to Section 9 of the Act in that parties to a bargaining relationship are obligated to bargain *in an appropriate unit* and the award obligates the Employer to bargain in an inappropriate unit. *Steel Workers*, 338 NLRB slip op. at 2. Based on the foregoing, the entire record, and having carefully considered the arguments of the parties at the hearing and in their briefs, I conclude that the former Seattle branch employees, reinstated at Puyallup, cannot properly be included in the unit represented by the Union at the Seattle branch.[13] Accordingly, I issue the following Order granting the Employer's petition to clarify the unit.

D.) ORDER

IT IS HEREBY ORDERED that the unit clarification petition filed herein be, and it is hereby granted to exclude the former Seattle branch employees, who were reinstated and relocated to the Puyallup zone, from the Seattle branch and/or the Seattle, Washington operations bargaining unit.

E.) RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board

[12] The Union has never made such a contention in these proceedings and the record evidence does not support such.

[13] My decision, in this case, is limited to the arbitrator's decisions as they impact on the scope of the bargaining unit. See *AFG Industries, Inc.*, 309 NLRB 307 (1992).

in Washington, D.C. by 5 p.m., EST on August 5, 2003. The request may **not** be filed by facsimile.

DATED at Seattle, Washington this 22nd day of July 2003.

_____
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174

385-2550-3700
385-7501-2581